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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1952

National Labor Relations Board, *Petitioner*

v.

Bill Daniels, Inc., and Walker Motors, Inc.

National Labor Relations Board, *Petitioner*

v.

Gilbert Motor Sales, Inc.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
I. Statement of the Case	2
A. The business of the Respondents	2
1. Operations of Respondent Gilbert	2
2. Operations of Respondent Daniels	3
3. Operations of Respondent Walker	3
B. The relationship between the Ford Motor Company and each of the Respondents	4
C. Proceedings before the Board	6
II. Supplemental Statement of the Case	7
A. Operations of Respondent Gilbert as disclosed by excluded transcript of prior representation proceeding	8
B. Relationship between Respondent Gilbert and Ford Motor Company as disclosed by excluded transcript of prior representation proceeding	8
III. Argument	
Summary of Argument	13
Point A	13
Point B	22
Conclusion	27
Appendix	28

CITATIONS

Cases:

National Labor Relations Board v. Conover Motor Co., (Tenth Circuit) 192 F. 2d 779	17
National Labor Relations Board v. Davis Motors, Inc., (Tenth Circuit) 192 F. 2d 782	17
National Labor Relations Board v. Howell Chevrolet Company — F. 2d — Volume 6 CCH Labor Law Reporter, Section 67,431	13
National Labor Relations Board v. Ken Rose Motors, Inc., 193 F. 2d 769	13
National Labor Relations Board v. M. L. Townsend, 185 F. 2d 378	16
National Labor Relations Board v. Somerville Buick, 194 F. 2d 56	13
Polish National Alliance v. National Labor Relations Board, 322 U. S. 643	20
Standard Oil Co. v. Federal Trade Commission, 340 U. S. 231	20
United States v. Pierce Auto Lines, 327 U. S. 515	24
Walling v. Jacksonville Paper Co., 317 U. S. 564	20

Statutes:

Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1001, et seq., 5 U.S.C.A. 1001, et seq.	25

Miscellaneous:

96 A. L. R. 945	23
Black's Law Dictionary, Third Edition	24

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BILL DANIELS, INC., WALKER MOTORS, INC., and GILBERT MOTOR SALES, INC., respectfully pray that the petition of the NATIONAL LABOR RELATIONS BOARD for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit entered on January 20th, 1953, which denied enforcement of orders issued by the Board against BILL DANIELS, INC., WALKER MOTORS, INC., and GILBERT MOTOR SALES, INC., be denied for the reasons hereinafter set forth.

I

STATEMENT OF THE CASE

Each of the Respondents submit that Part I of Petitioner's "Statement," which describes "the business of the several Respondents" is insufficient because it fails to bring out the complete picture of the relationship between each of them and the Ford Motor Company. In addition it is based in large measure upon conclusions reached by the Board, which were not sustained by the United States Court of Appeals for the Sixth Circuit, rather than upon the testimony introduced at the representation hearings and the hearings before the Trial Examiner in the complaint cases. In the interests of brevity and clarity, the Respondents submit the following statement of the case, which is intended to augment and supplement the Petitioner's statement and is not intended as a complete statement of the case.

A. The Business of the Respondents

The additional facts with respect to the business of each of the Respondents which should be before the Court may be summarized as follows:

1. Operations of Respondent Gilbert

Gilbert Motor Sales, Inc., a Michigan corporation, is an authorized Ford dealer engaged in the sale of new and used cars, parts and accessories and the servicing of cars (G. 140).[1] During the six month period ending December 31st,

[1]For purposes of this brief the procedure of the Board is followed in that the Gilbert record is cited as G and the Daniels-Walker record as D.

1949 its total purchases amounted to $798,021.27 (G. 140), and its total sales amounted to $842,362.80 (G. 140). The out-of-state purchases for that same period totaled $85.00 and it did not make any out-of-state sales (G. 140).

2. *Operations of Respondent Daniels*

Bill Daniels, Inc., hereinafter called "Daniels," a Michigan corporation, is an authorized Lincoln-Mercury dealer and has a sales agreement with the Lincoln-Mercury Division of the Ford Motor Company (D. 137). It is engaged in the sales of Lincoln-Mercury cars and used motor vehicles the sale of parts and the servicing of motor vehicles. It is located at 4141 Schaefer Road, Dearborn, Michigan (D. 138). It is not affiliated with any other company and has no connection with any other company. It has no connection with the Ford Motor Company other than the sales agreement with the Lincoln-Mercury Division hereinafter referred to (D. 138).

There is nothing in the Daniels-Walker record to support the Board's assumption contained on Page 9 of its petition that over half the parts handled by Respondent Daniels were manufactured outside the State of Michigan. None of the purchases made by Respondent Daniels were made outside the State of Michigan (D. 139) and only 1% of its total sales were shipped outside the State of Michigan (D. 139).

3. *Operations of Respondent Walker*

Walker Motors, Inc., a Michigan corporation, is an authorized Ford dealer with its service and sales room and place of business located at 9430 Woodward Avenue, Detroit, Michigan (D. 145). It has a sales agreement with the

Ford Motor Company of Dearborn, Michigan. The sales agreement is the same form of sales agreement that the Ford Motor Company has with all of its authorized Ford dealers (D. 145). Walker is not affiliated or associated with any other company. It is a separate and distinct legal entity (D. 146). During the period in question, Respondent Walker, did not make any purchases of any kind or any sales of any kind outside the State of Michigan (D. 146).

B. The Relationship Between the Ford Motor Company and Each of the Respondents

Each of the Respondents has a sales agreement with the Ford Motor Company or the Lincoln-Mercury Division of the Ford Motor Company, which governs the relationship between it and the Ford Motor Company, the form of this agreement being the same in all cases as Company's Exhibit No. 1 (G. 107-113). Pertinent portions of this sales agreement read as follows:

"Dealer Not to Act as Agent

> Dealer further agrees not to make any representation or warranty concerning company products on behalf of company, to refer purchasers to Manufacturers Warranty on the back of retail buyers order form, supplied by company and to not in any manner to attempt to assume or create obligations on behalf of company or in any manner attempt to act as agent of company." (G. 108, 109).

"Michigan Agreement

> That this agreement has been first signed by dealer and sent to company's office at Dearborn, Michigan for final approval and execution and has subsequently been there signed and delivered on behalf of company and the parties hereto intended to be executed as a Michigan agreement and construed in accordance with the laws of the State of Michigan." (G. 112).

"Limitation of Company's Liability

It is distinctly understood that this agreement contemplates that dealer will acquire dealer's own plant and facilities in accordance with dealer's own discretion and will purchase company products as dealer's own and resell them to customers selected by dealer, all in conformity with the requirements and limitations herein specified but otherwise in dealers own discretion. Nothing herein contained shall impose any liability on the company for any expenditures made or incurred by dealer in preparation for performance or in performance of this agreement." (G. 113).

Other pertinent portions of this sales agreement are referred to in the Board's petition, Pages 6 through 8, and hence will not be repeated here.

Under the terms of the sales agreement each Respondent is required to file a ten day dealer's report (G. 141), on the form identified as Company's Exhibit No. 2 (G. 115, 116), and a monthly financial statement (G. 141) on the form identified as Company's Exhibit No. 3 (G. 117).

When the Respondents are billed by the Ford Motor Company for new cars there is added to the invoice price a certain charge, which is part of the cost of the car to the dealer. The charge is designated as "P.A." on the invoice of the Ford Motor Company, which designates Promotion and Advertising. That money belongs to the Ford Motor Company which pays the excise tax on that amount as it does on the other charges which make up its entire invoice (G. 142).

In addition to that there is another charge which is also added to the invoice which is denominated as "D.A.," designating Dealer Advertising (G. 142). The Ford Motor Company collects that and turns it over to a Dealer's Advertising Fund, which is used by the dealers in the area of

metropolitan Detroit for the advertising of Ford cars and Ford service locally (G. 142).

Each Respondent also advertises in local newspapers, on the radio and possibly on billboards and advertising signs, all of which is done in the local area of Detroit (G. 142).

C. Proceedings Before the Board

Respondents Daniels and Walker accept Petitioner's statement contained on Pages 12 and 13 of its petition concerning the proceedings before the Board.

Respondent Gilbert accepts Petitioner's statement contained on Pages 10 and 11 of its petition concerning the proceedings before the Board but points out that the original petition in representation proceedings 7-RC-143, et al, was filed on behalf of a different local of the United Automobile Aircraft and Agricultural Implement Workers of America, C. I. O. (G. 187-188), namely, Local No. 415 (G. 40), than the local involved in the instant proceedings, which is Local No. 408 (G. 119). It should be noted that the prior proceedings involved a different period of time than that involved in the instant case and hence necessarily different facts and circumstances.

II

SUPPLEMENTAL STATEMENT OF THE CASE

As set forth in Petitioner's Specification No. 2 of errors to be urged, Respondent Gilbert, has contended as indicated by its objections in the instant complaint proceedings Case No. 7-CA-581 (G. 187-190) that the transcript in the prior representation proceedings, namely, Case No. 7-RC-143, et al, is not admissable as part of the transcript of record in the instant proceedings because the instant proceedings involved a different period of time and a different local of the union from the union involved in the prior representation proceedings, and hence, that the transcript in the prior representation proceedings had nothing to do with the petition of Local No. 408 in the representation proceedings Case No. 7-RC-960 and should not be a part of the record in the complaint proceedings arising out of the order and directive election of the Board in representation proceedings 7-RC-960. The position of Respondent Gilbert, as indicated by the instant petition, was sustained by the United States Court of Appeals for the Sixth Circuit, which held that it was error to admit the transcript of the prior representation proceedings 7-RC-143, et al, (D. 156). Undaunted, however, the Board has continued in this petition to base its statement as to Respondent Gilbert primarily on facts contained in that excluded transcript.

In the event this Court should rule against Respondent Gilbert on this question, the following supplemental statement of the case from the record in the prior representation proceedings is added. It is apparent, of course, that in any event said record could only be applicable to Respondent Gilbert and could in no way control the decision with respect to Respondents Walker and Daniels, despite obvious

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attempts by the Board to apply the excluded transcript to all three Respondents.

A. Operations of Respondent Gilbert as Disclosed by Excluded Transcript of Prior Representation Proceeding

Gilbert Motor Sales, Inc., is located and has its place of business at 10955 W. Jefferson Avenue, River Rouge, Michigan (G. 51). It is an authorized Ford dealer having a sales agreement with the Ford Motor Company of Dearborn, Michigan; the form of the agreement being the same as Company's Exhibit No. 1 (G. 51, G. 107, et seq.). Its relationship to the Ford Motor Company is governed and determined by the terms and provisions of this sales agreement (G. 51). The Board's assertion on Page 4 of its petition that Respondent Gilbert operates under a franchise from the Ford Motor Company finds no warrant in the record and is just one example of the Board's studied attempts to pass its overruled conclusions off as facts. Respondent Gilbert is not a parent or subsidiary of any other company (G. 51). It is not related or affiliated with any other Employer and does not have any other branches or locations (G. 51).

B. Relationship Between Respondent Gilbert and Ford Motor Company as Disclosed by Excluded Transcript of Prior Representation Proceeding

The Ford Motor Company, a Delaware corporation with its principal place of business in Dearborn, Michigan, is engaged in the manufacture, distribution and sale of Ford cars, trucks, tractors, bus chassis, and parts and accessories therefor, and of Lincoln and Mercury automobiles and parts and accessories therefor (G. 60). It operates manu-

facturing plants in Michigan, Ohio and New York (G. 60). The Ford Motor Company operates assembly plants in California, Georgia, Illinois, Kentucky, Michigan, Massachusetts, Minnesota, Missouri, New Jersey, New York Pennsylvania, Tennessee, Texas, and Virginia (G. 60). During the first six months of 1948, Ford Motor Company purchased approximately fifty-four percent (54%) of the parts and accessories sold to all of its dealers for service purposes from vendors with plants located outside of the State of Michigan (G. 61). In 1948 Ford Motor Company produced approximately 1,048,843 vehicles and the volume in 1949 was substantially the same (G. 61). The Ford Motor Company sells its products through dealers and at the present time it has sales agreements with approximately 7600 dealers (G. 61). With the exception of a comparatively few sales to the United States Government and sales of used company cars Ford Motor Company does not make a practice of selling vehicles directly to retail customers in the United States (G. 61).

The only regular reports dealers are required to furnish the Ford Motor Company with respect to the operation of their businesses are a ten day report of sales and a monthly financial statement (G. 61).

The Ford Sales Organization is under a vice-president in charge of sales and advertising division, who has supervision of the personnel connected with the sale and distribution of the Ford Motor Company's products (G. 61). Under this vice-president is the Ford Sales Manager, with his own staff, who supervises six regional sales managers, each of whom is in charge of one of the six sales regions into which the United States is divided for the distribution of Ford products (G. 61-62). Each region is further subdivided into four to seven districts, depending upon the size of the market and the number of dealers in the

region and district concerned, and each district is under the direction of a district manager (G. 61-62). Gilbert is in the Dearborn District, the central region of the Ford Sales Organization (G. 45-46, 62).

Ford Motor Company utilizes advertising to create favorable acceptance of its products in the following media: general magazines, business magazines, news magazines, daily newspapers, farm publications, trade and vocational publications, national network radio and television and outdoor bill boards and posters (G. 62). In addition, the company supplies its dealers with catalogs, hand-out materials, descriptive literature, display posters and sales manuals covering its products (G. 62). To help defray its advertising expenses Ford Motor Company charges the dealers a specified amount in connection with the sale of each new Ford, Mercury and Lincoln product purchased from the Ford Motor Company to be used by it for advertising and promoting the sale and servicing of Ford, Mercury and Lincoln cars and trucks and for such other purposes as the Ford Motor Company may at its discretion deem advisable (G. 62). For example commencing January 1, 1949 each Ford dealer was invoiced in connection with the purchase of each new Ford product $10.00 (G. 63). The Ford Motor Company pays the government excise tax upon such charges, the same as the Ford Motor Company pays the government excise tax on all other charges in its invoices to the dealers covering its products sold to the dealers (G. 44, G. 55, G. 56, G. 62, G. 63, G. 82, G. 142).

With respect to parts purchased by Ford Motor Company from outside the State of Michigan, they are finished parts. The vendors from whom such parts are purchased by the Ford Motor Company are independent contractors and not affiliates of the Ford Motor Company (G. 71). All parts ordered through the Ford Motor Company first come to rest

in Ford Motor Company's parts depots and warehouses in Michigan (G. 71, 74).

During the first six months of 1948 a very small percentage of cars were manufactured by the Ford Motor Company outside the State of Michigan, but whether any of them were shipped to any of the twenty-one dealers involved in the prior representation proceedings (No. 7-RC-143, et al) was not proved or established (G. 71, 72). Ford Motor Company manufactures the following products in its plants located outside the State of Michigan: radiators, springs, wheels, coil springs, running boards, running board brackets, forgings for passenger cars, trucks and tractors, transmissions, differentials, front suspensions, rear axles and engine parts (G. 73).

Under the terms of the sales agreements between Ford Motor Company and its dealers, a dealer is an independent contractor (G. 69, 70). Ford Motor Company does not supervise the service departments of dealers (G. 69, 70). Company representatives do call on dealers and advise and counsel with them with respect to problems arising in connection with the sales and servicing of the product of Ford Motor Company (G. 70). In addition, representatives of the Ford Motor Company from time to time investigate complaints in connection with alleged sales by dealers of non-genuine Ford parts which are claimed by the dealer at the time of the sale to be genuine Ford parts (G. 70). Ford dealers are not restricted in their purchases of replacement parts, the only restriction imposed on a dealer as set forth in the sales agreement is that the dealer will not in any place of business upon which dealers display company trademarks, trade names or any sign or indication that such place of business is that of an authorized Ford or Lincoln-Mercury dealer or service station, sell, recommend or knowingly allow to be recommended for sale or use as genuine

new Ford parts any parts which are not in fact genuine new Ford parts manufactured by Ford Motor Company (G. 75, 76). The Respondents and other Ford dealers are not restricted to the suggested price of the Ford Motor Company. Each Respondent and other dealers agree not to sell below that price but have the right to sell above that price if they desire to do so (G. 94).

III

ARGUMENT

SUMMARY OF THE ARGUMENT

POINT A. The Court below correctly held that the business of each of the Respondents herein did not affect commerce within the meaning of the Act.

POINT B. The Court below correctly held that the Board could not incorporate in the record for purposes of judicial review the transcript of a prior and different representation proceeding.

Point A

The Court below correctly held that the business of each of the Respondents herein did not affect commerce within the meaning of the Act.

This holding is not necessarily in conflict with the decisions of the United States Court of Appeals for the First Circuit in *N. L. R. B. v. Ken Rose Motors, Inc.*, 193 F. 2d 769 and *N. L. R. B. v. Somerville Buick Inc.*, 194 F. 2d 56 and with the decision of the United States Court of Appeals for the Ninth Circuit in *N. L. R. B. v. Howell Chevrolet Company* — F. 2d —, Volume 6, CCH Labor Law Reporter, Section 67,431. The fundamental flaw in the Board's position and its failure to properly understand the decision of the Court below is revealed in Footnote No. 8 on Page 16 of its petition where the Board says:

> "The impact of the decision of the court below cannot be restricted to automobile dealers located in Michigan. Although Ford's main plant is in Michigan,

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> it maintains assembly plants in several other States; see, for example, the *Ken Rose case*, supra. The Michigan plant is no different from the other plants in that in each the major portion of the parts which make up the completed automobile are manufactured outside the State in which the vehicle is assembled."

That statement simply does not accord with the facts. It likewise is at complete variance with the decision of the United States Court of Appeals for the Sixth Circuit, which said in its decision:

> "The circumstances that these dealers make all of their purchases in Michigan and practically all of their sales in Michigan is the controlling fact of the case." (D. 157)

As set forth above, the United States is divided into six regions for the distribution of Ford products (G. 61-62). The Respondents herein are located in the Dearborn and Detroit districts of the central region (G. 45-46, 62). To supply these six regions the Ford Motor Company maintains three manufacturing plants, one of which is located in Michigan (G. 60). The reason that parts are shipped to Ford Motor Company plants in Michigan from out-of-state suppliers is not because Respondents are in business in Michigan but because one of Ford Motor Company's three manufacturing plants and one of its assembly plants, from which motor vehicles are shipped all over the central region of the United States, are located in Michigan. It likewise should be remembered that the parts purchased by Ford Motor Company from vendors outside the State of Michigan all come to rest in Ford depots and warehouses in Michigan, from which they are taken as the needs of the Company dictate. Under these circumstances the interstate flow of these parts ends with their delivery in Michigan. If for reasons of lack of public acceptance, for example, there were no Ford dealers in Michigan, the interstate flow of

parts into Michigan would continue unabated to supply the parts necessary to manufacture and assemble cars for shipment to its central region. In brief, then, the Respondents and other similarly situated Ford dealers are in a unique position, in that they are not either directly or remotely the cause of interstate movement of parts and motor vehicles. It is obvious, of course, that if no one in Michigan purchased Ford products, the Ford Motor Company might suffer a drop in gross sales but surely the line between interstate and intrastate commerce is not so finely spun.

A comparison of the instant situation with the decisions above referred to, which are cited by the Petitioner as being in direct conflict with the decision of the Court below, reveals factual distinctions which are material.

The decision of the United States Court of Appeals for the Ninth Circuit in the *Howell case*, supra held that the Respondent, California Chevrolet dealer, which purchased all of its new cars and trucks from an assembly plant at Van Nuys, California, which in turn had obtained 43% of its component parts from outside the state, was engaged in commerce within the meaning of the Act. Two of the three judges who decided that case filed a concurring opinion which is brief and to the point:

> "Stephens, C. J. concurring: Once the business of the automobile dealer is held to be in intersate commerce, there is nothing to do but order the Board's order enforced. And this we must do under *National Labor Relations Board v. Hearst Publications, Inc.*, 1944, 322 U. S. 111(8 Labor Cases 51, 179), and *National Labor Relations Board v. Townsend*, 1950, 185 F. (2d) 378 (18 Labor Cases 65,967).
>
> Notwithstanding, I remain unconvinced that the word "employee" actually means more in the Wagner Act than elsewhere (*Hearst case*) or that a simple business transaction within a state is interstate commerce because of a fine-spun tracing of a remotely

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possible and unmeasurable relation to trade across a state line (*Townsend case*). Judge Harrison joins me in this concurrence."

It is apparent that the *Howell decision* was based in large part on the decision of the same Court in the case of *N. L. R. B. v. M. L. Townsend,* 185 F. 2d 378. In that case the Respondent was a Hudson retail dealer who purchased cars in California from the Hudson Motor Sales Corporation which, in turn, purchased its cars from out-of-state. The Court held that the threat of unfair labor practices of the Respondent, a retailer of new automobiles which originated out-of-state, presented such a threat of substantially interfering with the free flow of goods across the state lines that its activities were within the scope of the Act.

> "We think it apparent that the cessation of respondent's business due to a strike caused by its unfair labor practices would inevitably decrease the number of automobiles brought from without the State by the Hudson Sales Corporation during the period when respondents ceased to buy them because of a strike caused stoppage of its business of selling them."

It is clear that the Court based its decision in that case on the fact that cessation of Respondent's business would decrease the flow of vehicles brought from without the State.

After reviewing its decision in the *Townsend case,* the Court said in the *Howell case,*

> "We think that the difference between this and the *Townsend case* is one of degree only and not of substance."
>
> "Both because this Court's decision in the *"Townsend" case* supra, controls us here and because the Board's finding on the effect of this contractual relationship on the flow of interstate commerce is one which we should not disturb, we hold that the Board's finding that the respondent was engaged in commerce

> within the meaning of the Act must be affirmed by us."

It appears then that at least in large part these two decisions from the Ninth Circuit were based on the theory of causation, namely, that the activities of the respective respondents were directly responsible for the flow of goods in interstate commerce. As indicated above, that theory is not applicable to these Michigan respondents.

With respect to the two cases decided by the United States Court of Appeals for the First Circuit, the *Somerville case*, supra, was decided on authority of the *Rose case*, supra, without any further discussion of the jurisdictional issue.

In the *Rose case*, supra, an authorized Ford dealer located in Massachusetts purchased virtually all of its new cars, trucks and parts from a Massachusetts assembly plant of the Ford Motor Company and all of its sales were intrastate. The Court disposed of the issue of the jurisdiction of the National Labor Relations Board in one sentence:

> "The Ford Sales Agreement ties the respondent into a vast national network of an integrated distribution system which affects commerce."

The only authorities cited in support of this conclusion, which is otherwise unexplained, are *N. L. R. B. v. Conover Motor Co.* (Tenth Circuit) 192 F. 2d 779, and *N. L. R. B. v. Davis Motors, Inc.* (Tenth Circuit) 192 F. 2d 782.

The *Conover case*, supra, involved a Chrysler dealer. All of the new automobiles it purchased in 1949 were shipped to it from outside the State of Colorado. Likewise, in the *Davis case*, supra, the dealer purchased all of its new vehicles from out-of-state and the Court concluded that the fact that the dealer had a non-exclusive franchise did not mean that the work stoppage caused by a labor dispute

would not impede, burden or obstruct the free flow of interstate commerce.

It is readily apparent that the *Conover* and *Davis cases*, supra, are distinguishable from the instant cases in that the dealers involved in those cases were again directly responsible for the flow of vehicles in interstate commerce. While it is true that some of the language employed in the *Conover case* appears applicable to the cases at bar, a review of the facts indicates a clear and basic distinction between it and the instant cases and reveals that said decision should have been, if in fact it was not, based on the direct relationship of the activities of the Respondent to the interstate flow of goods.

With respect to the *Rose case*, it should be noted that the statement of the case does not accurately describe the scope of the operation of the Ford assembly plant in Massachusetts. It does not state whether that plant existed solely for the benefit of Massachusetts automobile dealers or whether it serviced a wider area. If the Court's decision was based upon the fact that the Massachusetts assembly plant for the Ford Motor Company serviced only Massachusetts Ford dealers, then obviously the case is not irreconcilable with the decision of the Court below, because there too the Court may have found that the dealer was directly responsible for the flow of goods in interstate commerce.

There can be no question but that there is a conflict between the United States Court of Appeals for the Sixth Circuit and the United States Courts of Appeals for the First and Ninth Circuits in the language of the various opinions as to the effect of the sales agreement between the various automobile dealers and the companies. However, the conflict appears more readily explained by the difference in the factual situations than by a difference of opinion

as to the scope of the commerce clause and the National Labor Relations Act. As the Court below said:

> "The Board urges that the geographical location of these dealers is not significant. But if the operation is entirely intrastate and one which would not substantially affect or injure interstate commerce the Board has no jurisdiction. The circumstance that these dealers made all of their purchases in Michigan and practically all of their sales in Michigan is the controlling fact of the case.
>
> If construed as the Board contends in this case the constitutional term "interstate commerce" will lose its meaning. The boundary between state and nation will be obliterated. As stated by Chief Justice Hughes in *N. L. R. B. v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 31:
>
> "The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds."
>
> "The Supreme Court continues, speaking of the scope of congressional power of control over intrastate activities that have a close and substantial relation to interstate commerce, page 37:
>
> "Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." (D. 157)

It is plain then that by its express terms the decision of the United States Court of Appeals for the Sixth Circuit

in the instant case is applicable only to Michigan Ford Dealers and hence not in conflict with the cases cited by the Board.

It is further submitted that there is no conflict between the decision of the Court below and the decisions of this Court in *Walling v. Jacksonville Paper Co.*, 317 U. S. 564 and *Standard Oil Co. v. Federal Trade Commission*, 340 U. S. 231, both of which were considered by the Court below on the Board's petition for re-hearing. In the *Jacksonville Paper case*, this Court held that goods purchased by a wholesaler upon the order of a customer with definite intention that such goods shall be carried at once to the customer and goods obtained by a wholesaler to meet the needs of specified customers pursuant to an understanding thereof not for immediate delivery were all within the stream of commerce until delivery was made. From the facts as set forth above, it is apparent that that decision is in no wise applicable to the instant cases.

More recently in the case of *Standard Oil Co. v. Federal Trade Commission*, 340 U. S. 231, this Court held that gasoline delivered to customers in Detroit, which was taken from a gasoline terminal to which gasoline was brought from the Indiana refinery for the customers in the Detroit area was in interstate commerce within the meaning of the Clayton-Patman Act, while en rouute to delivery in that area.

> "Such temporary storage of the gasoline as occurs within the Detroit area does not deprive the gasoline of its interstate character."

This Court has often stated that decisions construing one Act of Congress are not very helpful in subsequently construing another Act. As Justice Frankfurter said in *Polish National Alliance v. N. L. R. B.*, 322 U. S. 643:

> "Constitutional questions that look alike often are altogether different and call for different answers because they bring into play different provisions of the

constitution or different exertions of power under it."

It does not seem appropriate for the purposes of this brief to discuss the question of whether cases holding a movement "in commerce" under the Fair Labor Standards Act are applicable to the "affecting commerce" clause of the National Labor Relations Act, because it is immediately apparent that there is a fundamental distinction between the instant cases and the *Standard Oil case*. The record will not sustain the Board's implied assumption that the parts manufactured outside the state were brought into Michigan because the Respondents were located there. As set forth above, these parts flow into Michigan from out-of-state suppliers because the Ford Motor Company has plants in Michigan where new cars are manufactured and assembled, and from which the vehicles and parts are distributed to retail dealers in the central region. The element of causation is lacking, and therefore, the shipments of cars and parts to these Respondents by the Ford Motor Company are not analagous to the shipments of goods in the *Standard Oil case*.

A decision overruling the United States Court of Appeals for the Sixth Circuit and sustaining the Board's theory that because these Respondents have a sales agreement with the Ford Motor Company or a divison thereof they are *ipso facto* in an activity affecting commerce within the meaning of the Act regardless of the fact that they buy and sell locally in Michigan, can only result in the total obliteration of the distinction between interstate and local commerce. It is elementary in our modern industrial society that all manufacturing activities are geared to supply and demand. Obviously any manufacturer who distributes his product on a nationwide basis keys his manufacturing program to the demand for the product, and it is equally obvious that a cessation of the demand in

any locality for any reason whatsoever would logically, though only to a minute and immeasurable amount, affect the activities of that manufacturer whether he is selling a water pistol or an automobile. There can be no distinction either in fact or in law between the activities of these Respondents and the activities of any retailer who buys and sells locally a nationally advertised product, some of the component parts of which initially originated out-of-state. The distinctions between the relationship which exist between the Ford Motor Company and these Respondents and the relationship between any other manufacturer and retail outlets are only distinctions occasioned by the nature of motor vehicles, which obviously must be handled by a dealer who is equipped to carry and service them. These are only distinctions of degree and not of substance. The relationship of the activities of these Respondents to interstate commerce is just as remote and immeasurable. To sustain the Board's position is to state in effect that any retailer who handles a nationally advertised product is in an activity affecting commerce and to extinguish for all time the heretofore jealously guarded line of demarcation between those interstate activities properly within the province of the Federal government and local transactions heretofore left to the control of the forty-eight states.

Point B

The Court below correctly held that the Board could not incorporate in the record for purposes of judicial review the transcript of a prior and different representation proceeding.

The Board contends that it took official notice of the record in an earlier representation proceeding involving Respondent Gilbert, but a review of the facts[2] reveals that

[2]a summary of which is contained on Pages 10-11 of the Board's Petition.

the Board did much more than this. At the outset of the representation proceeding upon which the instant complaint against Respondent Gilbert is based, which was Case No. 7-RC-960, counsel objected to the hearing on the grounds that the Board was without jurisdiction (G. 138-139), which objection was overruled (G. 139). At that time testimony was taken and the Board determined that Respondent Gilbert was engaged in an activity affecting commerce, and therefore, subject to its jurisdiction.

Subsequently on April 16th, 1951, the instant complaint case was filed, which was Case No. 7-CA-581 (G. 145, et seq.), and a hearing thereon was held on July 23rd, 1951 (G. 179, et seq.). At the conclusion of that hearing and after the Board had already overruled Respondent's objections and determined that it had jurisdiction, it incorporated the record of the prior representation proceeding between a different local union and Respondent Gilbert, which record covered a different period of time and involved different parties (G. 190), the same being Case No. 7-RC-143.

It is submitted that this procedure cannot be justified by the glib assertion that the Board is taking "official notice" of its records just as a Court takes judicial notice of its records. If, in a civil suit a judgment obtained in a prior action in the same Court between the same parties were pleaded in bar, would the Courts take judicial notice of that former judgment? Most emphatically no.

> "By the weight of authority even where a judgment of the same Court is pleaded as a bar or as conclusive of an issue, the existence and contents of the judgment must be proved by offering the record or a certified copy thereof in evidence." (*96 A.L.R.* 945)

If the Courts will not take judicial notice of their own judgments under such narrow circumstances, the Board was certainly not justified in taking what it calls official

notice of a prior and different proceeding and incorporating the record thereof in the record of this case for purposes of judicial review.

As a matter of fact the Board is merely using the term "official notice" in an attempt to justify its irregular procedure. Since official notice is merely the Administrative Agency's counterpart of judicial notice, it is interesting to read a definition of judicial notice.

> "Judicial notice," the act by which a Court in conducting a trial or framing its decision will of its own motion and without the production of evidence recognize the existence and truth of certain facts having a bearing on the controversy at bar, which from their nature are not properly the subject of testimony or which are universally regarded as established by common notoriety, e. g., the law of the state, international law, historical events, the constitution and course of nature, main geographical features, etc." (*Black's Law Dictionary*, Third Edition.)

The procedure of the Board so far transcended the bounds of official notice that no further comment seems necessary.

However, the Board proclaims that the holding of the Court below is contrary to this Court's decision in *United States v. Pierce Auto Lines*, 327 U. S. 515. As the Court will undoubtedly recall that case involved an application by two motor carriers for Certificates of Public Convenience and Necessity to substitute independent and competing service between certain cities which the two applicants had serviced jointly prior to these individual applications. The Court continues a description of the proceedings (p. 20) as follows:

> "However, because they were so closely related in their common features, the hearings were held at the same place and one application was heard immediately after the other. Each applicant intervened in the pro-

ceedings on the Court's applications and various parties including the appellees appeared in opposition in both proceedings. *The parties stipulated that much of the evidence presented in the O. N. C. hearing should be introduced by reference into the Consolidated record.*" (emphasis our own)

"This included all of the appellees affirmative evidence in opposition to the two applications. The hearings thus were substantially coordinated, though technically not consolidated for the common features of the applications."

Thereafter the Commission ultimately dealt with both applications in a single report. The basis of the appellants' objections to this procedure was not that the Commission had improperly considered evidence or had impropely incorporated evidence into the record but that the Commission improperly considered two separate records as though the cases were consolidated and the findings and conclusions in the separate proceedings were so comingled in a single report as to make it impossible to determine therefrom which record gave support to them.

This is the background for the excerpts from this Court's opinion contained in the Board's Petition. It is submitted that the factual situation has nothing in common with the Board's conduct in the instant case and that when read in is entirety the *Pierce case* presents no authority for the introduction into evidence of a transcript from a prior and different proceeding.

The Board next adopts the position that its procedure was authorized by the *Adminstrative Procedure Act* (60 Stat. 237, 5 U. S. C. 1006(d), 5 U. S. C. A. 1006(d)). As set forth above the jurisdictional issue was raised and decided in the second representation proceeding No. 7-RC-960. If the Board had decided to incorporate the record of the prior and distinct representation proceeding, Case No. 7-RC-143, it would not have been authorized to do so by

the *Administrative Procedure Act.* The application of Section 7(d), portions of which are reprinted in the Appendix hereto, is limited to "hearings which Section 1003 or 1004 of this Title requires to be conducted pursuant to this section." By its express terms Section 1004 which will be found in the Appendix hereto, excludes from its application and from the application of 1006, hearings involving the certification of employee representatives.

It is apparent, therefore, that under the very terms of the *Adminstrative Procedure Act,* the Board's procedure was not proper.

The Board concludes its argument on this subject by stating that "nothing in the Board's decision in that case or in the later proceedings against Gilbert suggests that the Board attributed any such sales to Gilbert (or even relied on such sales or its finding the other dealers were engaged in activities affecting commerce). In short, the Board took official notice of the earlier proceeding with respect to facts relevant to Gilbert; since Gilbert was a party to that proceedings and the issue was indentical Gilbert suffered no prejudice."

The hollowness of this virtuous pronouncement is self-evident from the Board's own petition on Page 9 where in describing the operations of Bill Daniels, Inc., it includes data from the record in the prior Gilbert representation proceedings, which record was properly excluded by the Court below.

CONCLUSION

It is, therefore, respectfully submitted that this case is not a proper one for review by certiorari in this Court and that the Petition for a Writ of Certiorari should be denied.

Dated: June 8th, 1953.

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APPENDIX

1. The relevant provisions of the *Administrative Procedure Act* (60 Stat. 237, 5 U.S.C. 1001 et seq., 5 U.S.C.A. 1001 et seq. are as follows:

"Section 1004. Adjudications

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts *de novo* in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 1010 of this title; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives."

"Section 1006. Hearings; presiding officers; powers and duties; burden of proof; evidence; record as basis for decision

In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section * * *.

(d) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 1007 of this title and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any part shall on timely request be afforded an opportunity to show the contrary."